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IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2013/0051**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50463724
Dated: 27 February 2013

Appellant: **Julian Farrand**

First Respondent: **The Information Commissioner**

Second Respondent: **London Fire Brigade**

Heard at Fleetbank House

Date of Hearing: **5 September 2013**

Before

HH Judge Shanks

Judge

and

Rosalind Tatam and **Richard Fox (decd)**

Tribunal Members

Date of Decision: **23 October 2013**

Representation:

Appellant:	In person
Information Commissioner:	Richard Hopkins
London Fire Brigade:	Annabel Lee

Subject matter:

Data Protection Act 1998

s.1(1)	Personal data
s.2	Sensitive personal data
Sched.1	Data Protection Principles: *Principles*
Sched.2	Data Protection Principles: *Processing of Personal data*
Sched.3	Data Protection Principles: *Processing of sensitive data*

Freedom of Information Act 2000

s.40	Absolute exemption: *Personal data*

Cases:

Common Services Agency v Scottish Information Commissioner [2008] UKHL 47

South Lanarkshire Council v Scottish Information Commissioner [2013] UKSC 55

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

REASONS FOR DECISION

Background facts

1. At about 7 am on Saturday 31 March 2012 a fire broke out in the living room of a basement flat in a Victorian mansion block in central London. The block is part of a group of blocks which we shall refer to as MM; we shall refer to the occupier of the flat in question as Ms S. The London Fire Brigade was called and the fire was put out. There was extensive damage to Ms S's flat but no-one was hurt. We unhesitatingly accept the evidence of Elizabeth Frimstone, another resident of the block, that this was a very frightening experience for those present at the block that morning and that it gives rise to sincere and substantial worries about the safety of all the residents, in particular older people and children. Matters were made worse by the fact that there was a secondary fire caused by rekindling the following afternoon which again involved the Fire Brigade.

2. The Fire Brigade was unable to see any obvious accidental cause for the original fire and the police were involved. In due course a Fire Investigation Report (FIR) was produced in relation to both incidents. It concluded in section 12: "At the time of writing the cause of the initial incident is still under investigation. No conclusions have been reached at this time …"

3. The Appellant, Mr Farrand, is a resident of a neighbouring block which is part of MM and both he and Ms Frimstone are directors of MM Ltd, the company which owns the freehold of MM. We fully accept that as a resident and board member of MM Ltd he

had a strong legitimate interest in discovering as much as he could about the cause and (therefore) the implications of the fire and sharing such information with his fellow board members and, furthermore, that that interest is not solely a private one. However, we also gained the clear impression from his submissions and from the evidence given by Ms Frimstone and various uninvited interventions she made that there was a degree of animosity towards Ms S in MM.

4. Shortly after 25 April 2012 the board of MM Ltd was provided with an investigation report prepared for insurers which concluded that the fire was probably caused by a candle causing a smouldering fire in the upholstery of an armchair or an electrical fault in a table lamp in the living room. Since the preparation of the FIR referred to above the Fire Brigade has reached the view that it is most probable that the cause of the fire was a naked flame source which accidentally caused the ignition of adjacent combustible material. That view has been shared with Mr Farrand.

5. On 5 July 2012 Mr Farrand requested the Fire Brigade to send him a copy of the fire investigation report(s) on the fire; he later clarified that the request was made under the Freedom of Information Act 2000. On 2 August 2012 the Fire Brigade supplied him with a redacted copy of the FIR; they relied on section 40(2) of FOIA, which exempts third party personal data in certain circumstances, to justify the redactions. The redacted text relates mainly to Ms S but the names of Fire Brigade and police personnel and various witnesses were also redacted, as were photos and plans of Ms S's flat.

6. Mr Farrand objected to the redactions and complained to the Information Commissioner under section 50 of the Act. In a decision notice dated 27 February 2013 the Commissioner upheld the Fire Brigade's position on the basis that all the redacted material constituted personal data and that disclosure would be unfair to the data subjects, because it would be contrary to their reasonable expectations and cause distress while any public interest in disclosure would not outweigh those considerations, and thus it would contravene the first data protection principle. Mr Farrand has appealed to this Tribunal against the Commissioner's decision notice.

Procedural matters

7. For obvious reasons and in accordance with normal practice, the Tribunal in this case was provided with a full unredacted copy of the FIR and some closed written submissions by the Commissioner and the Fire Brigade and there was a "closed session" in the absence of Mr Farrand during which the Tribunal questioned the Commissioner and the Fire Brigade about the redactions and they made some oral submissions. It is clear that Mr Farrand has been unhappy with this aspect of the procedure from the outset. As the Tribunal has sought to explain to him, it was necessary for the Tribunal to see the redacted material in order to decide the appeal fairly but if it was also disclosed to him the whole process would become pointless since he would have obtained the very thing which the Fire Brigade and the Commissioner maintained he should not obtain. We assure him that the Tribunal has been scrupulous in trying to ensure that we have only received representations which have not been disclosed to him where that was also necessary and appropriate.

8. In the course of his oral submissions at the hearing Mr Farrand raised a point relating to paragraphs 2 and 3 of Part II of Schedule 1 to the DPA which the Tribunal had not anticipated and the Tribunal therefore directed that the parties should put in written submissions about it after the hearing. When closing the hearing and giving that direction it was the Tribunal's understanding that Mr Farrand had otherwise said all that he wished to. He has subsequently stated that he had not completed his oral submissions and understood that the Tribunal was adjourning for a further oral hearing but he has fairly agreed in his further written submissions dated 8 October 2013 that the Tribunal can proceed without a further hearing on the basis that it gives appropriate consideration to those written submissions; we assure him we have taken full account of them in reaching our decision.

9. He and the other parties have also agreed that Judge Shanks and Ms Tatum can continue with the appeal and give a binding decision notwithstanding the sad death of Mr Fox shortly after the hearing. We are satisfied that we have jurisdiction to do so under para 15 of Schedule 4 to the Tribunals, Courts and Enforcement Act 2007.

<u>The issues on the appeal</u>

10. Based on the submissions of the parties it seems to us that the issues for us to consider can be summarised as follows:

    (1) the scope of Mr Farrand's complaint to the Commissioner (and therefore the scope of his decision notice and of this appeal);

    (2) whether the redacted material within the scope of the appeal constituted anyone's "personal data" (or in particular "sensitive personal data");

    (3) whether disclosure of any such material by the Fire Brigade would have contravened the first data protection principle; and in particular:

        (a) whether disclosure of the material would have amounted to processing it "fairly";

        (b) whether disclosure would have met condition 6(1) in Schedule 2 to the Data Protection Act 1998;

        (c) whether disclosure of any "sensitive personal data" would also have met any of the conditions in Schedule 3 thereof.

<u>(1) The scope of the appeal</u>

11. In the course of correspondence between Mr Farrand and the Commissioner it was noted that Mr Farrand had stated to the Fire Brigade after receiving the redacted FIR that he was particularly interested in certain paragraphs of the report (these were the ones relating to Ms S and did not include the redacted names of personnel, the photos or the plans) and the Commissioner stated: "Therefore, the scope of the case will *focus* on those paragraphs" (our emphasis). Mr Farrand replied to the relevant email briefly without demur. On the basis of this exchange the Commissioner says that the scope of Mr Farrand's complaint to him (and thus of the appeal) was limited to the particular paragraphs referred to. We do not accept that position; we agree with Mr Farrand that looking at the whole picture objectively his complaint was and remained a complaint about all redactions from the FIR, including, therefore, the names of personnel and the photos and plans.

<u>(2) “Personal data”</u>

12. As we understand it Mr Farrand does not dispute (and we are satisfied) that the names of personnel and witnesses in the FIR constitute “personal data” and that the remainder of the redacted text and the photos and plans “relate to” Ms S so as to come within the first part of the definition of “personal data” in section 1(1) of the Data Protection Act 1998.

13. But, Mr Farrand points out, in order to constitute “personal data” the data must not only relate to a living individual but the individual concerned must also be *identifiable* either from the data itself or from the “… data *and* other information which is in the possession of … the data controller” (our emphasis) and he referred us to a passage in the decision of the House of Lords in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 at para [24] where Lord Hope points out that it must be the *combination* of the putative personal data and the other information which potentially leads to the identification of the individual. In this case, Mr Farrand submits, the identity of Ms S is obvious from the parts of the report which have been disclosed and the redacted passages relating to her do not add anything to anyone’s ability to identify her as the putative data subject and are thus not within the definition of “personal data.”

14. In our view this argument is wholly misconceived. The redacted passages relating to Ms S are completely meaningless until they are inserted back into the correct part of the FIR from which they have been redacted. So, properly analysed, the putative “personal data” include not just some random words (or photos or plans) but also information about where those words, photos or plans have come from and where they appear in the report. It is indeed a *combination* of that data and the remainder of the report that tells the reader that the words (or photos or plans) relate to Ms S and not some other person.

15. We are therefore quite satisfied that all the redacted material constitutes personal data. Furthermore, there are various redacted passages which clearly consist of information as to Ms S's "… religious beliefs or other beliefs of a similar nature" so as to come within the definition of "sensitive personal data" in section 2 of DPA, as Mr Farrand appears to accept.

(3) First data protection principle

16. There were various issues of principle which arose in relation to the proper interpretation of section 40 of FOIA and the first data protection principle which we consider in paragraphs 17 to 20 below. So far as the relevant statutory provisions are concerned, section 40 provides in effect that personal data is exempt information under FOIA if its disclosure "…to a member of the public otherwise than under [FOIA] would contravene any of the data protection principles." The first data protection principle is to be found in Part I of Schedule 1 to the DPA and is as follows:

Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless:

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Condition 6(1) in Schedule 2 is as follows:

The processing is necessary for the purposes of legitimate interests pursued by … the third party … to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

17. Mr Farrand submitted in effect that the conditions in Schedules 2 and 3 and the interpretive provisions in Part II of Schedule 1 provide the only criteria for judging whether data were processed "fairly" and that the Commissioner had been wrong *in principle* to consider fairness as a free-standing concept in his decision notice without reference to condition 6 in Schedule 2. We reject that submission. It seems to us

from the wording of the first data protection principle and Part II of Schedule 1 that the concept of fair processing is not confined in the way Mr Farrand suggests and that it is open to the relevant decision maker to consider either fairness in general or condition 6 first as seems most appropriate in any particular case. We do not read any of the case law referred to by Mr Farrand as suggesting otherwise.

18. Mr Farrand also submitted that the burden lay on the Fire Brigade to establish that the exemption applied and that the contents of the Fire Brigade's letter dated 4 January 2013 (pp 116 to 120 of our bundle) supporting its position contained no evidence on which it could properly rely to do so, in particular because no contact had been made with any data subjects by the Fire Brigade to obtain their views. This submission in our view is misconceived: there are no rules of evidence in relation to the decision making process of a public authority or a complaint to the Commissioner (or, for that matter, an appeal to the Tribunal: see rule 15(2)(a)(i) of the 2009 Rules); but obviously the weight given to any material to be relied on by the public authority or Commissioner or Tribunal may depend on the kind of factors Mr Farrand would seek to rely on in relation to the contents of the Fire Brigade's letter.

19. Mr Farrand also submitted that the Fire Brigade and the Commissioner were not entitled to take account of any distress to data subjects that would be caused by disclosure in considering unfairness in the absence of a "stop notice" having been served by the data subject under section 10 DPA. We can see no basis for that contention in any of the relevant provisions of the DPA.

20. The Commissioner submitted that in the light of the wording of section 40 FOIA (disclosure to "… *to a member of the public* otherwise than under [FOIA]") the only legitimate interests that can be considered in relation to condition 6 in Schedule 2 to the DPA are *public* interests and not the private interests of the person seeking the information. We do not read the relevant provisions in that way. More importantly, it is clear from the decision of the Supreme Court in *South Lanarkshire Council v The Scottish Information Commissioner* [2013] UKSC 55 that they do not either: see in

particular para [24]. In any event, as we say in paragraph 3 above, in this case Mr Farrand's private interests have a public element.

21. Notwithstanding our conclusion in paragraph 17 above that there was nothing wrong *in principle* with the Commissioner considering fairness in general before considering the conditions in Schedules 2 and 3 to DPA we prefer to consider those conditions first in this case. In general, our experience is that the balancing process required by condition 6 in Schedule 2 to the DPA will often provide the whole answer in a case like this.

Schedule 3 DPA

22. As we state in paragraph 15 above, some of the redacted information is Ms S's "sensitive personal data." As such, it was exempt under FOIA unless one of the conditions in Schedule 3 to the DPA was met. Since no-one has suggested that any of those conditions could be met it is clear that it was not open to the Fire Brigade to disclose that information under FOIA, whatever the merits. Mr Farrand's professed knowledge about Ms S's beliefs (as set out in paragraph 37 of his further submissions) is neither here nor there.

Schedule 2 condition 6 DPA

23. Condition 6(1) in Schedule 2 to the DPA is the only candidate which has been suggested as being met in relation to the remaining redacted information.

24. As he concedes, Mr Farrand is not particularly interested in the names of Fire Brigade and police personnel or witnesses. We are unable to see that there was any necessity for any of them to be disclosed for the purposes of his legitimate interests and in those circumstances it is clear that condition 6 was not met regardless of any prejudice to the individuals concerned.

25. Nor can we see any necessity for the disclosure of the photos and plans of Ms S's flat which we do not believe would have contributed to Mr Farrand's understanding of the cause of the fire. Condition 6 could not therefore be met in relation to the photos and plans either. There is therefore no need for us to consider the extent of any likely prejudice to Ms S resulting from disclosure of the photos and plans (though we would readily accept that such disclosure (particularly of the photos) may have caused her considerable distress and thereby prejudiced her legitimate interests).

26. That leaves the redacted text in paragraphs 3.20, 3.24, 3.25, 7.1, 7.2, 11.1, 11.2, 11.6, 11.8 and 12 of the FIR. We are prepared to accept that disclosure of this information was "necessary" for the purposes of Mr Farrand's legitimate interest in finding out as much as he could about the cause of the fire and sharing it with his fellow board members of MM Ltd. However, it would not in our view have contributed in any substantial way to their understanding of the causes of the fire for two reasons: first, because, from what Mr Farrand has told us in his written and oral submissions, it is unlikely that any of it would have come as a great surprise to them; and, second, because none of it led to more than a tentative conclusion by the writer of the FIR, as shown by the unredacted words from section 12 which we quote in paragraph 3 above.

27. As to the likely prejudice to Ms S's legitimate interests resulting from disclosure of the information in those paragraphs, we note first that the contents thereof come from three sources (evidence that she herself gave to fire officers, an uninvited inspection of her flat and views expressed by others about her character and habits) and that it all relates closely to her private and home life and thus her rights under Art 8 of the ECHR. We do not agree with the Commissioner that Ms S was entitled to a strong expectation of confidentiality in relation to this information, not least for the reason identified by Mr Farrand at paragraph 14 of his further submissions, namely that the Fire Brigade has stated publicly that they may share personal data with a number of bodies including "landlords." However, we are of the view that disclosure of Ms S's personal data to Mr Farrand would inevitably have led to its disclosure to the remainder of the board of MM Ltd and, particularly in view of the apparent animosity

towards her which we observed, that there would have been a real risk that it would then have been published or otherwise used to her prejudice, which may well have caused her considerable distress. We therefore consider that disclosure of this information would have involved substantial prejudice to her legitimate interests.

28. Balancing the relative weight of the factors we refer to in paragraphs 26 and 27, we have come to the view that disclosure of the redacted text would not have been warranted in this case and that condition 6(1) would not therefore have been met.

29. Given our conclusions at paragraphs 22 to 28 above there is no need for us to consider the general fairness of any disclosure since none of the conditions in Schedule 2 (or, in relation to sensitive personal data, Schedule 3) would have been met and disclosure would therefore have contravened the first data protection principle in any event. For that reason we agree with the conclusion reached by the Commissioner that the Fire Brigade was not obliged under FOIA to disclose the redacted material in the FIR to Mr Farrand, although we reach that conclusion by a rather different route.

Mr Farrand's "new" point

30. Mr Farrand drew our attention to paragraphs 2 and 3 of Part II of Schedule 1 to the DPA. Those paragraphs provide in effect that fair processing for the purposes of the first data protection principle may in some circumstances *require* data subjects to be provided with certain information by the data processor (the Fire Brigade in this case). In the light of our conclusions above there is no need for us to consider these provisions further but, as the Tribunal made clear to Mr Farrand at the hearing and contrary to the position maintained by the Commissioner in his further submissions on the point, we are still of the view that these provisions may have caused a real difficulty for Mr Farrand's case even if it had otherwise succeeded. It would certainly be no answer for him to say that the Fire Brigade as data processor could not rely on their own wrong as against him for the simple reason that the provisions in question are not designed for his or the Fire Brigade's benefit but for the benefit of third party data subjects. The interesting issues that might have arisen can in the event await another case; in the meantime we would invite the Commissioner to remind public

authorities of these provisions so that third party data subjects are given the opportunity to make any representations they wish before decisions are made on FOIA requests.

Disposal

31. For the reasons set out above we unanimously dismiss the appeal.

HH Judge Shanks

23 October 2013